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IN THE

Supreme Court of the United States

October Term, 1945

No. 482

Estate of JEROME J. HANAUER, LEWIS L. STRAUSS and CARRIE H. HANAUER, Executors,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MORRIS L. ERNST
Solicitor for Petitioners

SAMUEL J. SCHUR
LEO ROSEN
Of Counsel

507 BAR PRESS, INC., 47 WEST ST., NEW YORK. BO. 9—0157 - 8

SUBJECT INDEX

	PAGE
Judgment Sought To Be Reviewed	1
Opinions of the Courts Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Specification of Error	4
Summary Statement of the Matters Involved	5
The Issue	5
The Facts	5
Tax Court Ruling and Opinion	10
Circuit Court of Appeals Ruling and Opinion	10
Reasons Relied on for Allowance of the Writ	11
I. The decision of the Circuit Court of Appeals herein is inconsistent with the decision of the Tax Court herein	11
II. Both the decision of the Tax Court and of the Circuit Court of Appeals herein are inconsistent with the decisions in all other reciprocal trust cases decided by the Second Circuit, by other Circuit Courts of Appeals and by the Tax Court	13
(A) The law in reciprocal trust cases until the decision in the instant case	13
(B) The inconsistency of the Tax Court decision herein with the decided cases in the reciprocal trust field; the conflict with the principles laid down in the McLean case	17

PAGE

(C) The inconsistency of the Circuit Court of Appeals decision herein with the decided cases in the reciprocal trust field 19

III. The decision below constitutes a deprivation of petitioners' property without due process of law 22

IV. The question of the proper rule to be applied in reciprocal trust cases such as the case at bar is an important question of Federal law which has not been but should be settled by this Court 22

Conclusion 24

CASES CITED

	PAGE
Cole Est. v. Commissioner, C.C.H. Dec. 12935-G, T.C. Docket Nos. 108,285; 108,283, decided Jan. 29, 1943; aff'd 140 F. (2d) 636 (C.C.A. 8th, 1944)	14
Commissioner v. Dravo, 119 F. (2d) 97 (C.C.A. 3rd, 1941), aff'g 40 B.T.A. 309 (1939)	14
Commissioner v. McLean, 127 F. (2d) 942, aff'g 41 B.T.A. 1266 (1940)	3, 13, 15, 16, 18, 23
Commissioner v. Warner, 127 F. (2d) 913 (C.C.A. 9th, 1943) reversing 42 B.T.A. 954 (1940)	14
Eckhardt Est. v. Commissioner, 5 T. C. No. 80, August 31, 1945	15
Fish Est. v. Commissioner, 45 B.T.A. 120 (1941)	14
Frost Lumber Industries v. Commissioner, 128 F. (2d) 693 (C.C.A. 5th, 1942)	23
Helvering v. Stuart, 317 U.S. 154 (1942)	23
Hoeper v. Tax Commission, 284 U.S. 206 (1931)	22
Lehman v. Commissioner, 109 F. (2d) 99 (C.C.A. 2d, 1939) cert. den. 310 U.S. 637 (1940)	14
Lindsay v. Commissioner, 2 T.C. 174 (1944)	11, 12, 13, 15, 16, 17, 21
Morgan v. Commissioner, 309 U.S. 78 (1939)	23
Morgan's, Inc. v. Commissioner, 68 F. (2d) 325 (C.C.A. 5th, 1933), aff'd 293 U.S. 121 (1934)	23
Neal Estate v. Commissioner, Prcn. Hall Tax Ct. Memo, par. 43518, Docket No. 484, decided December 21, 1943	14

PAGE

Old Colony R. Co. v. Commissioner, 284 U.S. 552 (1931) 23

Oliver Estate v. Commissioner, Pren. Hall Tax Ct. Memo, par. 44138, Docket No. 1132, decided April 28, 1944 14

Rosenblath, Matter of, 146 N. Y. Misc. 424 (1933) 23

Strong's Will, In re, 171 N. Y. Misc. 445 (1939) 23

Whiteley Est. v. Commissioner, 42 B.T.A. 316 (1940) 15

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

Constitution: Amendment V 22

Judicial Code:
Sec 240(a), U.S.C., Sec. 347(a) 2

Section 302(c) of the Revenue Act of 1926 (44 Stat. 70, ch. 27) as amended by Section 803(a) of the Revenue Act of 1932 (47 Stat. 279, ch. 209) 3

Section 302(d) of the Revenue Act of 1926 (44 Stat. 71, ch. 27) as amended by Section 401 of the Revenue Act of 1934 (48 Stat. 752, ch. 277) and as further amended by Section 805(a) of the Revenue Act of 1936 (49 Stat. 1744-45, ch. 690, Section 411) 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Judgment Sought to be Reviewed

The Estate of Jerome J. Hanauer, Lewis L. Strauss and Carrie H. Hanauer, executors, petitioners below, respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals herein (R. 129) entered on July 5, 1945, affirming a judgment of the Tax Court of the United States upholding a deficiency in estate tax determined by the respondent.

Opinions of the Courts Below

The Tax Court wrote an opinion which is not officially reported but appears at Record page 101. The opinion of the Circuit Court of Appeals (R. 124 *et seq.*) which consisted of Circuit Judges Evans and Chase and District Judge Hincks was written by Judge Hincks, and is reported in 149 F. (2d) at page 857.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on July 5, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C., Sec. 347(a)) as amended by the act of February 13, 1925.

Questions Presented

(1) Was the Circuit Court of Appeals in error in holding that the corpus of the trust created by Carrie H. Hanauer should be included in the gross taxable estate of the decedent, Jerome J. Hanauer?

(2) Was the Circuit Court of Appeals in error in holding that the decedent Jerome J. Hanauer should be deemed in law the grantor of the trust created by Carrie H. Hanauer?

(3) Was the Circuit Court of Appeals in error in holding that the decedent Jerome J. Hanauer should be deemed in law the grantor of the trust created by Carrie H. Hanauer because "her transfer was caused by his"?

(4) Is the decision of the Circuit Court of Appeals herein affirming the decision of the Tax Court herein inconsistent with and contrary to the decision of the Tax Court?

(5) Is the decision of the Circuit Court of Appeals herein in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean,* 127 F. (2d) 942?

(6) Does the decision of the Circuit Court of Appeals herein set up for estate tax cases a different substantive rule than was declared by the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean,* 127 F. (2d) 942 for gift tax cases?

(7) Is the decision of the Circuit Court of Appeals herein inconsistent with and contrary to its own prior decisions as well as the decisions of other Circuit Courts of Appeals and of the Tax Court in the other decided cases involving reciprocal trusts?

(8) Does the decision of the Circuit Court of Appeals herein impose a tax which deprives petitioners of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

Statute Involved

Section 302(c) of the Revenue Act of 1926 (44 Stat. 70, ch. 27) as amended by Section 803(a) of the Revenue Act of 1932 (47 Stat. 279, ch. 209).

Section 302(d) of the Revenue Act of 1926 (44 Stat. 71, ch. 27) as amended by Section 401 of the Revenue Act of 1934 (48 Stat. 752, ch. 277) and as further amended by Section 805(a) of the Revenue Act of 1936 (49 Stat. 1744-45, ch. 690, Section 411).

> "Sec. 302 [as amended]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States • • •
>
> • • •

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. • • •

"(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death."

Specification of Error

The Circuit Court of Appeals erred in affirming the judgment of the Tax Court and in failing to reverse the same.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The Issue

As the Tax Court stated, "the single question in this proceeding is whether or not the cash and securities" in a trust created on the 3rd day of June, 1932 by Carrie H. Hanauer, "should be included in the gross estate" of Jerome J. Hanauer, deceased, her husband (R. 101). Mr. Hanauer died a resident of New York State on September 3, 1938. The petitioners herein are the duly qualified executors of his Last Will and Testament.

The Facts

Many of the facts were stipulated, and in any event there is no dispute between petitioners and respondent as to the underlying facts. The points of difference between them go to the question of the legal conclusions which may be drawn from the uncontroverted facts which briefly summarized are as follows:

At all the times material herein, Carrie H. Hanauer was the wife of Jerome J. Hanauer, whom she married in 1900. He was a wealthy man, having total property amounting to more than $5,000,000 in each of the ten years preceding his death (R. 60, 99). Mrs. Hanauer also had substantial means of her own; it was stipulated that on December 31 of each of the five years preceding the creation of the trust at issue herein she had a net worth of not less than $1,250,000 (R. 22, 99). Her income was sufficient for all her personal needs, and the record shows she had an independent mind and will for matters involving the expenditure of her funds (R. 57, 59). At the same time, in matters of investment policy she relied not only on her own judgment but also on her husband, and their son-in-law, Lewis L. Strauss, both of whom were partners in the investment banking firm of Kuhn, Loeb & Co

(R. 56, 96). She was also in the habit of discussing her financial affairs with her cousin, Morris L. Ernst, who was her and her husband's personal attorney. She always conferred with Mr. Ernst independently and not in the presence of her husband (R. 60). At one such session with him in the fall of 1931, Mr. Ernst advised her that for a variety of reasons Mr. Hanauer was thinking of putting some of his property in trust and she asked whether it might not be advisable for her to set up a trust too; some discussion ensued but no decision was reached. That winter, Mr. and Mrs. Hanauer went abroad, and while they were abroad one of her two grandchildren (the children of Lewis L. Strauss and their daughter, Alice Hanauer Strauss) died. According to Mrs. Hanauer's testimony, she then decided definitely to trustee a substantial part of her property:

> "I made up my mind definitely then to do it. [set up a trust] I felt I had no more family. I had lost a grandchild, there would be no more family and I thought it was a good thing to do. I thought if my husband was doing it, it would be a good thing for me to do" (R. 62).

On her return from abroad in April, 1932, Mrs. Hanauer again spoke to Mr. Ernst about the preparation of a trust instrument (R. 61, 99). She said she wanted about half of her wealth to be put in trust (R. 68), and she left to her husband and son-in-law the selection of the exact securities to be trusteed (R. 68). In May, Mr. Ernst advised her that if she was going to create a trust, she should do so promptly because gift tax legislation was impending. Subsequently he again urged her to make a final decision because the passage of the gift tax bill then pending in Congress appeared imminent (R. 68). The trust agreement was finally executed on June 3, 1932. The Revenue Act of 1932 imposing a tax on gifts made subsequent to the date of its enactment was passed on June 6, 1932.

On June 3, 1932, the decedent also created a trust. The technical provisions of the trust created by him were identical with those of the trust created by Mrs. Hanauer except that her trust named him and his named her as a Trustee and life beneficiary (Exhs. 1-A, 2-B, R. 24-49). Mr. Ernst acted as attorney for both parties in drawing up the trust instruments (R. 88). However, neither Mr. Ernst nor Mrs. Hanauer knew the amount of the decedent's trust or even that his trust was worth about the same as hers at the time of its original creation (R. 68, 92).

The foregoing summarizes briefly the genesis of Mrs. Hanauer's trust. Mr. Hanauer had entirely separate reasons for setting up his trust, reasons which appear in some detail in the record and the decisions of both lower Courts.

In 1931 Mr. Hanauer was a senior partner in the banking firm of Kuhn, Loeb & Co. (R. 73, 88, 96). In June, 1931 Mr. Mortimer L. Schiff, the other active senior partner who like Mr. Hanauer had been in the firm for twenty years, died suddenly. Mr. Hanauer was greatly disturbed by this unexpected loss, both from a personal viewpoint and because he felt that Mr. Schiff's death would result in an increased burden upon him at Kuhn, Loeb & Co. (R. 76, 89). The depression was three years old and the conditions and prospects of the banking business were bad (R. 73, 74). It appeared that the firm of Kuhn, Loeb & Co. might sustain a loss for 1931. Mr. Hanauer was "of two minds as to whether the firm should continue and was confident in his own mind that he should not continue in any case" (R. 74). In fact, he recommended that the remaining partners should wind up the firm (R. 76).

Mr. Hanauer was also a director of many corporations and he was greatly concerned over the possibility that as director he might be sued because it was a period in which such suits were rife (R. 75, 87, 88). Within a few days of Mr. Schiff's death, the decedent spoke with his son-in-law Lewis L. Strauss about retirement and early in the au-

tumn of 1931 he served on all his partners, in accordance with his agreement with them, notice of his intention to retire (R. 76, 86, 100). He was persuaded by them to remain for one year more but at the end of 1932, about six months after the creation of his trust, he did in fact retire (R. 76, 87, 100).

In the fall of 1931, at about the same time as he gave notice to his partners of his intention to retire, Mr. Hanauer spoke for the first time about creating a trust, to his personal attorney, Mr. Ernst (R. 88). He told Mr. Ernst then and on many other occasions (they saw each other once or twice a week) about his concern over the general financial situation and over the many suits then being brought against directors, and finally, of his determination to leave Kuhn, Loeb & Co. (R. 89). The reasons the decedent mentioned to Mr. Ernst for the creation of a trust were the safeguarding for his wife and only child of at least a portion of his property and in addition the relief it would be to him if the care and responsibility of managing a portion of his assets devolved upon his son-in-law, Lewis L. Strauss (R. 89). Although Mr. Hanauer informed Mr. Strauss of his intention to create a trust, he never mentioned to Mr. Strauss even the possibility that Mrs. Hanauer was also going to set up a trust (R. 77). He never urged or suggested to Mrs. Hanauer that she create a trust of her own property nor at any time did he indicate that he would not create his trust unless she created one (R. 67). Mrs. Hanauer learned of her husband's intention to set up a trust from Mr. Ernst (R. 61, 90, 99).

The trust agreement executed by the decedent transferred certain property to Mrs. Hanauer and Mr. Strauss as trustees in trust to pay the income to Mrs. Hanauer for life and then to their only child, Alice Hanauer Strauss, for life, with remainders as provided. The property transferred consisted of securities which at that time had a fair market value of $751,132.45 (R. 20).

The trust created by Mrs. Hanauer transferred certain property to the decedent and Mr. Strauss as trustees in trust, to pay the income from such trust fund to the decedent for life and then to their only child, Alice Hanauer Strauss, for life, with remainders as provided. The property transferred by Mrs. Hanauer consisted of $25,000 in cash and securities having a fair market value at that time of $698,740.96[1] (R. 20).

On September 8, 1935, more than three years after the creation of his trust, the decedent made a further transfer to it of securities having a then market value of $151,648.33 (R. 20). This represented an addition of approximately 1/5 to the corpus of the trust (R. 20). Mrs. Hanauer knew about the addition (R. 20) but not its amount (R. 68). However, during her husband's lifetime, she never made any further transfer of any kind to the trust created by her (R. 20).

Mr. Hanauer died on September 3, 1938. Section 302 of the Revenue Act of 1926 as amended provides, *inter alia*, that there shall be included in the gross estate of a decedent the corpus of any trust created by him during his life under the provisions of which he has the power to alter, amend, revoke or terminate. The decedent was given such power in connection with the trust created by Mrs. Hanauer.

The Commissioner of Internal Revenue took the position that each of the Hanauers had executed his trust in consideration of the other's doing likewise and that Mr. Hanauer might properly therefore be considered the settlor of the trust created by his wife.[2] If Mr. Hanauer

1. The securities constituting the corpora of both trusts were all readily marketable stocks and bonds widely held by investors and with one minor and immaterial exception the grantors had neither control nor active participation in the management of any corporate issuer of any such security.

2. That is the sole issue involved in the instant case. There is no contention that either trust was a transfer in contemplation of death. Mr. Hanauer died more than six years after creating his trust and it is stipulated that both trusts were created at a time when their settlors "were both in good health" (R. 22).

can thus be regarded, the powers of amendment conferred upon him would clearly render the corpus of that trust part of his gross taxable estate. We dispute not the conclusion but the premise: *i. e.*, we maintain that the decedent cannot consistently with the law or the Constitution be regarded as the settlor of the trust created by his wife.

Tax Court Ruling and Opinion

On the foregoing facts, the Tax Court stated the issue as it saw it, as follows: "the question is whether the trusts were created in consideration of each other" (R. 105). The Tax Court made no finding that the decedent *had agreed* with his wife that each should execute his trust in consideration of the other's doing likewise. Summarizing the facts, the Tax Court found merely that the Hanauers "did not consider the creation of their respective trusts and did not execute them independently and apart". From this finding the Tax Court went on to conclude that "each created his respective trust in consideration of the other" (R. 101).

Circuit Court of Appeals Ruling and Opinion

The Circuit Court of Appeals' formulation of the issue in this case was quite different from that of the Tax Court. According to the Court of Appeals, Mrs. Hanauer's belief "that the decedent was creating a trust of substantial dimensions for family beneficiaries * * * coupled with other relevant evidence in the record, was sufficient to support a finding that *her transfer was caused by his.* That was enough" (R. 128; italics ours). Not only did the Circuit Court of Appeals fail to find as did the Tax Court that "each created his respective trust in consideration of the other" (R. 101) but on the contrary, the Circuit Court specifically left open the question whether on this record, mutual consideration could be found:

> "Nor should it [the holding of the Circuit Court of Appeals] be taken as an intimation that the evidence here could support a finding that the wife's transfer was effective to bring about the decedent's transfer,—a finding not essential to support the result reached here" (R. 129-130).

In other words, the Circuit Court's theory was that because Mrs. Hanauer knew her husband was creating a trust for her benefit, and because she patterned her action after his, the corpus of the trust created by her can be properly included in his gross estate—this even though his action was in no way induced by hers.

Reasons Relied on for Allowance of the Writ

We submit that the decision of the Circuit Court of Appeals is inconsistent with the decision of the Tax Court herein; that both are at variance with all the other decided cases involving reciprocal trusts in the Second and other Circuits as well as in the Tax Court; and that the proper rule to be applied in determining the taxability of reciprocal trusts is an important question of federal law which has not been but should be decided by this Court.

I. THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN IS INCONSISTENT WITH THE DECISION OF THE TAX COURT HEREIN.

The gravamen of the Tax Court's decision herein is that Mr. and Mrs. Hanauer each created his trust in consideration of the other's doing likewise. Judge Harron's entire opinion is pointed up to this finding of a mutual consideration. And by consideration, the Tax Court obviously meant consideration in its usual contractual meaning. Thus the Tax Court considered a controlling distinction between this case and the case of *Lindsay* v. *Commr.*, 2 T. C. 174 (1944) the fact that there "the hus-

band grantor of a trust had * * * no knowledge of his wife's execution of a trust" (R. 104). In the view of the instant case taken by the Circuit Court of Appeals, however, the knowledge of the husband grantor is immaterial since the question of whether his action was induced by his wife's was in terms left undecided. The Court of Appeals considered as the determinative factor the knowledge of the *wife* that her husband was creating a trust for her, knowledge, incidentally, which also existed in the *Lindsay* case, *supra,* where although the testimony was undisputed that the wife had followed her husband's lead in creating her trust, it was held that her trust should not be included in his gross estate.

Presumably the Circuit Court of Appeals shifted from the theory of mutual consideration because it found no facts in the record to support such a theory, the silence of the Record in this respect being the basis of our appeal from the Tax Court to the Circuit Court of Appeals. However, although the Circuit Court of Appeals seems to have agreed that the Record failed to support the Tax Court's finding that "each created his trust in consideration of the other", it attached the consequence of this finding, namely the includability of the trust created by Carrie Hanauer in the decedent's gross estate, not to such a finding of mutual consideration but to its own deduction that Mrs. Hanauer's transfer was "caused" by Mr. Hanauer's.

We shall point out below why we believe both theories are irreconcilable with the decided cases in the field and merely reflect the confusion in an important field of property rights that will exist unless this Court sees fit to resolve it by granting the writ prayed for herein. Suffice it for present purposes to say that the opinions of the two lower courts in this case are patently inconsistent with each other.

II. BOTH THE DECISION OF THE TAX COURT AND OF THE CIRCUIT COURT OF APPEALS HEREIN ARE INCONSISTENT WITH THE DECISIONS IN ALL OTHER RECIPROCAL TRUST CASES DECIDED BY THE SECOND CIRCUIT, BY OTHER CIRCUIT COURTS OF APPEALS AND BY THE TAX COURT.

(A) The Law in Reciprocal Trust Cases Until the Decision in the Instant Case

Until this case was decided, it appeared to be settled that the facts of simultaneous execution, substantially equal trust properties and similar provisions in trust instruments were not conclusive that trusts were executed in consideration of each other. *Lindsay Est.* v. *Commissioner, supra; Commissioner* v. *McLean,* 127 F. (2d) 942 (C. C. A. 5th, 1942). The *McLean* case involved gift tax liability asserted upon transfers in trust made simultaneously by husband and wife each for the benefit of the other in substantially equal amounts and under similar trust instruments. The taxpayer contended that the transfers were not gifts, and that each trust was made in consideration of the other trust, relying upon the three facts of simultaneous execution, substantially similar amounts and similar trust provisions. Both the Circuit Court and the Board of Tax Appeals (41 B. T. A. 1266) held that these facts alone were insufficient to prove consideration.

It was assumed until the decision of the case at bar by the Tax Court that if this was the rule of law applicable in gift tax cases, it was also the rule of law applicable in estate tax cases. In every estate tax case in which the corpus of a trust created by one grantor was held properly included in the gross estate of his spouse, either consideration was actually or in effect conceded or the taxpayer failed to introduce any evidence of consideration so that the usual presumption of correctness

attaching to the findings of the Commissioner of Internal Revenue prevailed.

Thus in the seminal case of *Lehman* v. *Commissioner*, 109 Fed. (2d) 99 (C. C. A. 2d, 1939), cert. den. 310 U. S. 637 (1940) the stipulation of facts on which the case was tried included a provision that the trusts were created in consideration of each other. (See 39 B.T.A. 17, 20.) *Neal Estate* v. *Commissioner*[1] involved reciprocal trusts created by one instrument, the preamble to which recited that "The donors in consideration of One Dollar and other good and valuable consideration each transferred to the Trustees certain listed securities in trust for the other." In *Oliver Estate* v. *Commissioner*[2] not only did the Court point out that "the respondent contends and *counsel for the petitioners admits* that these were reciprocal or cross trusts" (italics ours) but the trusts created in that case consisted in large part of stocks of the same company unlike the case at bar where the securities were diverse (R. 21). In the *Warner Brothers* case,[3] the stipulation of facts revealed that the three brothers had created their trusts pursuant to an agreement between them, while in the *Dravo case*,[4] which arose under a different statute, the taxpayers themselves offered evidence to prove that the trusts were created in consideration of each other. In the *Fish*[5] and *Cole*[6] cases, the taxpayers

1. Pren. Hall Tax Ct. Memo, ¶43518, Docket No. 484, decided December 21, 1943.

2. Pren. Hall Tax Ct. Memo, ¶44138, Docket No. 1132, decided April 28, 1944.

3. *Comm'r* v. *Warner*, 127 F. (2d) 913 (C.C.A. 9th, 1943), reversing 42 B.T.A. 954 (1940).

4. *Comm'r* v. *Dravo*, 119 F. (2d) 97 (C.C.A. 3rd, 1941), aff'g 40 B.T.A. 309 (1939).

5. *Fish Est.* v. *Comm'r*, 45 B.T.A. 120 (1941).

6. *Cole Est.* v. *Comm'r*, C.C.H. Dec. 12935-G, T.C. Docket Nos. 108,285; 108,283, decided Jan. 29, 1943; aff'd 140 F. (2d) 636 (C.C.A., 8th, 1944). There are many other distinguishing factors in both the *Fish* and *Cole* cases. In the latter, for example, the entire corpora of both trusts consisted of stocks of the same insurance company and the preamble to the husband's trust recited his intention that the stock "remain in his family for many years more" (140 F. (2d) at 638). Furthermore, the husband was a director of the company and all the income from both trusts was paid into a joint bank account of the settlors.

introduced no evidence whatever that the trusts had not been created in consideration of each other. Since the Commissioner's finding against them necessarily included a finding that the trusts had been created in consideration of each other, the Court had no choice but to uphold his ruling in the complete absence of any evidence to the contrary. In the *Whiteley*[1] case, the Court itself pointed out that the taxpayer did not specifically deny that the trusts were created in consideration of each other. The most recent Tax Court decision in the field involved the creation of trusts by a husband and wife who had been associated in business and finance during their entire married life; the corpus of each trust was jointly owned real estate, and it was the custom of the settlors to keep their funds in a joint account.[2]

The applicability to estate tax cases of the *McLean* case rule that simultaneity, substantial similarity in amount and reciprocity do not establish consideration was, prior to the decision of the case at bar, made clear by the Tax Court itself in the case of *Lindsay* v. *Commissioner, supra,* involving facts strikingly similar to those herein. In addition to all the other factual parallels,[3] the wife in the *Lindsay* case ascribed precisely the same "cause" for the creation of her trust as Mrs. Hanauer testified to herein:

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1. *Whiteley Est.* v. *Comm'r,* 42 B.T.A. 316, 321 (1940).

2. *Eckhardt Est.* v. *Comm'r,* 5 T.C. No. 80, August 31, 1945.

3. In both cases, the trusts were created by husband and wife; the phraseology of the trust indentures was the same; each spouse was a life beneficiary of the trust created by the other; the remainder interests designated by each trust were the children and grandchildren of the settlors; the trusts were in similar amounts; in the case at bar, the trusts were executed on the same date; in the *Lindsay* case, they were dated one day apart; the attorney who prepared both trust indentures was in each case a close relative of the settlors; in the *Lindsay* case, their son; in the instant case, their cousin; in each case, it was the husband who first conceived the idea of creating a trust and he had over a period of time discussed the project with his attorney; in neither case did the wife know the amount of the corpus of her husband's trust; in both cases, the wives had substantial independent means (*Lindsay* Transcript, p. 10); in both cases, the trust indentures were executed when they were with the gift tax in mind.

Lindsay	*Hanauer*
"Father has shown me a copy of his trust agreement and I would like to do something similar" (*Lindsay Transcript,* p. 15).	"* * * my husband was a very smart man, and I thought anything he could do was just as good for me as for him, and I decided to do it" (R. 66).

Actually there are, in the case at bar, further factual elements not present in the *Lindsay* case, proving that the settlors had in large part different reasons for creating their trusts and that the trusts represented independent transactions.[1]

In the *Lindsay* case the Tax Court found "that petitioners have successfully carried their burden and have established that the transfers were 'separate, independent and unconnected transactions' " (2 T. C. 174, 178). Following the rule of the *McLean* case, the Court pointed out that "the facts that the trusts were executed about the same time, were in substantially equal amounts and had similar provisions are not conclusive that the trusts were interdependent and were executed in consideration of each other. See *Marrs McLean,* 41 B.T.A. 1266, and the opinion of the Circuit Court of Appeals affirming that case on this point, 127 Fed. (2d) 942, 943" (2 T. C. 174, 178-179).

This was the posture of the law in the Tax Court and in the Second and other Circuits until the instant case declared a different rule for the Second Circuit; presumably it is still the law elsewhere.

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1. *e. g.,* the death of the decedent's partner Mortimer Schiff and his general situation vis-a-vis Kuhn, Loeb and Company; the death of one of the settlor's two grandchildren, which meant so much especially to Mrs. Hanauer; the uncertainty of the times and the addition by the decedent to his trust of $151,648.33, approximately one-fifth of the original corpus of the trust.

(B) The Inconsistency of the Tax Court Decision Herein with the Decided Cases in the Reciprocal Trust Field; the Conflict with the Principles Laid Down in the McLean Case

The Tax Court paid at least lip service to what had always been the law in reciprocal trust cases, namely, that in order for the corpus of the trust created by one settlor to be included in the estate of the other, a finding must be made that the trusts were created in consideration of each other, and that reciprocity, simultaneity and similarity in amount were insufficient as the basis for such a finding. Recognizing that in all the other reciprocal trust cases summarized above the finding of mutual consideration rested on something more than simultaneity, similarity and reciprocity, the Tax Court herein attempted to bring its decision in line with the other cases in the field, by purporting to find here, as in them, additional evidence of consideration over and above these three factors. Thus, the Court pointed out that "Carrie H. Hanauer's considerations paralleled those of Jerome Hanauer in exactness of time right down to the final drafting and execution of the trusts" (R. 103). "The other strong evidence," says the Court, "against a conclusion that her step was separate and independent of his is that she did not decide herself what the amount of the corpus of her trust should be or what properties should comprise the corpus" (R. 104). The only other additional factor adverted to by the Tax Court is that in the case at bar, unlike the *Lindsay* case, "the husband-grantor of a trust had * * * knowledge of his wife's execution of a trust" (R. 104).

We submit that on the Record herein, these three attempted distinctions are insufficient as a matter of law to warrant the divergence of the Tax Court decision herein from the cases previously decided. Certainly, mere knowledge by one settlor that another settlor is setting up a

trust does not prove consideration but is an entirely neutral factor which takes on color only from the other circumstances of the case. This has been recognized in the related field of reciprocal wills, discussed *infra,* page 23, footnote 1. Although, concededly, the decedent had such knowledge in the case at bar, the Circuit Court of Appeals cautions against its opinion herein being taken even as "an intimation that the wife's transfer was effective to bring about the decedent's transfer" (R. 129-130). The statement by the Tax Court that Carrie H. Hanauer "did not decide herself what the amount of the corpus of her trust should be" is at variance with the undisputed testimony of Mrs. Hanauer that it was she alone, who without consultation with the decedent, instructed that about half of her wealth should be placed in trust (R. 68, 92).[1] And the parallelism of deliberation by husband and wife finds more than its counterpart in the *McLean* case, *supra,* where the facts revealed a much more consistent and lengthy parallelism of action on the part of husband and wife.

Thus the attempted distinctions between the Tax Court decision herein and the *McLean* and *Lindsay* cases fail. The result reached by the Tax Court herein is clearly inconsistent with the holdings in the *McLean* and *Lindsay* cases and derives no support whatever from the other reciprocal trust cases decided by the various Circuit Courts of Appeals and the Tax Court, in all of which the finding of mutual consideration rested on factors totally absent in the case at bar.

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1. The Circuit Court of Appeals inferentially corrected this statement of the Tax Court, stating: "Although she is stated herself to have decided that her trust corpus should not exceed in size one-half of her estate * * *" (R. 127).

(C) The Inconsistency of the Circuit Court of Appeals Decision Herein with the Decided Cases in the Reciprocal Trust Field

Apparently recognizing that the facts as found by the Tax Court herein do not support a finding of mutual consideration as a matter of law, the Circuit Court of Appeals herein sustained the Commissioner's finding on a theory totally different from that which was pressed by the Government and from that heretofore always considered applicable in reciprocal trust cases. We have seen above that in all such cases the question whether the trusts were executed in consideration of each other was considered the crucial one, and that in every case where that question was answered in the affirmative, compelling circumstances over and above simultaneity, similarity in amount and reciprocity were present. The Tax Court tried to force the facts of the case at bar into this accepted framework. The Circuit Court of Appeals, apparently agreeing with our contention that this could not be done, abandoned the framework and instead evolved, so far as we know for the first time, a theory of "causation" under which it upheld the Tax Court's determination that the corpus of the trust created by Carrie H. Hanauer might properly be considered part of the gross estate of Jerome J. Hanauer. According to the Circuit Court of Appeals, Mrs. Hanauer believed "that the decedent was creating a trust of substantial dimensions for family beneficiaries" and "that belief coupled with other relevant evidence in the record, was sufficient to support a finding that her transfer was caused by his. That was enough" (R. 128). This theory of causation is a new theory for reciprocal trust cases, and one which hopelessly confuses the hitherto well established doctrine of consideration in this field. The Circuit Court of Appeals finds no evidence of any agreement, direct or indirect, between the parties to set up the trusts each for the benefit of the other. The Court cau-

tions against its holding being taken even "as an intimation that the evidence here could support a finding that the wife's transfer was effective to bring about the decedent's transfer—a finding not essential to support the result reached here" (R. 129-130). The Court finds instead that the creation of her trust by Mrs. Hanauer "was caused" by Mr. Hanauer's creating his trust (R. 128). Since the Court makes plain that this concept of causation is something different from the mutual consideration which was found in all other reciprocal trust cases and which the Tax Court purported to find below, the decision of the Circuit Court of Appeals herein finds no support in any decided case. In effect, the Court has decreed a psychological test—and has held that the corpus of a trust set up by one person may be included in the estate of another if the settlor followed the lead of the other in creating the trust. The limits of such a doctrine are difficult to define. Would the result have been the same, for example, if the decedent, intending himself to create a trust, had persuaded his wife to create one out of love and affection for their only grandchild, and then had failed to create one himself? Under such circumstances, her "belief" that he was creating a trust would certainly have "caused" her transfer—, "would have been effective to bring [it] about," to use the words of the Circuit Court. Many such questions inevitably arise in connection with the novel causation theory of the Circuit Court. We submit that the theory is without precedent and should be rejected by this Court in favor of the well established rule of mutual consideration in reciprocal trust cases. So far as we know, this is the only reciprocal trust case where the holding does not rest squarely on a finding of mutual consideration—a finding which the Circuit Court expressly refrained from reaching herein.

It goes without saying that since the decedent is not nominally the creator of the trust set up by his wife, and since the statute taxes only *his* gross estate, the corpus

of the trust created by her from her own property can be included in *his* estate only on some theory under which he may be constructively regarded as its true settlor. The theory which the courts have until now uniformly adopted in reciprocal trust cases is the well settled doctrine of equity jurisprudence that if A furnishes the consideration for a trust nominally created by B, A may be regarded as the true settlor of B's trust. Obviously, in order for this doctrine to be applied to reciprocal trust cases, technical consideration must be found. Only if A set up his trust in consideration of B's setting up his, can it be said that A furnished the *res* of the trust created by B within the meaning of the established equity doctrine. The Circuit Court of Appeals' opinion discards the Tax Court theory of consideration and rests instead on a theory of suggestion and causation. Reduced to its elements, the Circuit Court's theory is that if B follows the lead of A in creating a trust, A may be regarded as the true settlor of B's trust.[1] There is no equity doctrine to this effect. We submit that the Circuit Court's holding that Mrs. Hanauer's "transfer was caused by" Mr. Hanauer's is insufficient in law to warrant treating the corpus of the trust created by her as part of his gross estate. The very cornerstone of the applicability of the doctrine which makes such a treatment possible, namely consideration, is admittedly lacking.

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1. It is noteworthy that in the *Lindsay* case, where the crucial fact of "causation" was also the same, the Tax Court refused to include the corpus of the wife's trust in the husband's estate. There, too, the testimony was uncontroverted that the wife created her trust because "she would like to do the same thing" as her husband. The Tax Court quite correctly did not consider this patterning of action as sufficient reason for taxing the corpus of the trust created by the wife to the husband's estate.

III. THE DECISION BELOW CONSTITUTES A DEPRIVATION OF PETITIONERS' PROPERTY WITHOUT DUE PROCESS OF LAW.

The statute pursuant to which the Commissioner purported to act herein provides that under certain circumstances there shall be treated as part of the gross estate of a decedent the corpus of a trust *created by him* prior to his death. The equitable doctrine discussed above applied to reciprocal trust cases and premised on a finding of mutual consideration, has made it possible for the Commissioner and the courts to regard the corpus of a trust set up by another as part of the taxable estate of the decedent. The case at bar, however, is the first case in which property which always admittedly belonged to some one other than the decedent is included in the estate of the decedent merely because its owner patterned her actions after his when she placed it in trust. Such an attempt to tax the property of one to another has constitutional implications. This Court has in the past held such attempts to be arbitrary, capricious and unreasonable, and therefore unconstitutional deprivations of property under the due process clause of the Fifth Amendment. See *Hoeper* v. *Tax Commission*, 284 U. S. 206 (1931).

IV. THE QUESTION OF THE PROPER RULE TO BE APPLIED IN RECIPROCAL TRUST CASES SUCH AS THE CASE AT BAR IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The law should be such that a man knows the tax consequences of his acts. In the light of the decision of the Circuit Court of Appeals in the instant case, it would seem that a different substantive rule of law prevails in gift

tax cases (See *Commissioner* v. *McLean, supra*) than prevails in estate tax cases. Thus, the taxpayer appears to be whipsawed depending on what the Commissioner is trying to prove—and this despite the well established rule which in "cases of doubt give(s) the benefit to the taxpayer." *Frost Lumber Industries* v. *Commissioner,* 128 Fed. (2d) 693 (C. C. A. 5th, 1942); see also to the same effect *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552 (1931); *Morgan's, Inc.* v. *Commissioner,* 68 Fed. (2d) 325 (C. C. A. 5th, 1933), aff'd 293 U. S. 121 (1934).

Furthermore, the correct rule of law to be applied even in estate tax cases involving reciprocal trusts is impossible to ascertain so long as the conflict in theory between the decision below and the decisions in the other reciprocal trust cases is unresolved.[1]

---

1. There is a further underlying question of federal law necessarily implicit in all these reciprocal trust cases which is also of considerable importance, namely, the question of what law is applicable to determine consideration *vel non*. While all the reciprocal trust cases appear to decide the question of consideration in terms of federal law, it may well be under the decisions of this Court that the law of the place where the trusts were created should in each case be applied. See *Morgan* v. *Commissioner,* 309 U. S. 78, 80 (1939); *Helvering* v. *Stuart,* 317 U. S. 154, 161 (1942). If this Court should hold that local law governs, the decision below is clearly erroneous since under the law of New York, where the trusts were created, the facts found herein are insufficient as a matter of law to prove consideration. See *In re Strong's Will,* 171 N. Y. Misc. 445, 448 (1939): "Even in the typical setting, where the claim of reciprocity is usually set up, because each spouse leaves all to the other by wills executed at the same time and before the same witnesses, the rule has long been established that something more than even such great similarity is required; and that in addition thereto *an agreement to make such counterpart wills must be clearly and satisfactorily proven, and that proof by presumption is insufficient.*" (italics our own); see also *Matter of Rosenblath,* 146 N. Y. Misc. 424, 425 (1933): "The only testimony which has any bearing on the making of the alleged contract is that which was given by the respondent's attorney, who testified that he drew two wills, one for the decedent and the other for the respondent, and both of which were duly executed and thereafter given to the decedent. Under the terms of these wills, decedent left everything to her husband and the respondent left everything to the decedent. The attorney also testified that the decedent said that she and her husband had made similar wills before. The most that can be gathered from this testimony is that the parties made reciprocal wills, but the evidence fails to disclose that they were executed pursuant to any agreement."

Conclusion

For the foregoing reasons, your petitioners, by their solicitor, pray that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit, to the end that the case may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

Morris L. Ernst
Solicitor for Petitioners

Samuel J. Schur
Leo Rosen
Of Counsel

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	11

CITATIONS

Cases:

Cole's Estate v. *Commissioner*, 140 F. 2d 636	8
Eckhardt, Estate of v. *Commissioner*, 5 T. C. No. 80	8
Lehman v. *Commissioner*, 109 F. 2d 99, certiorari denied, 310 U. S. 637	8, 9
Lindsay v. *Commissioner*, 2 T. C. 174	10
McLean v. *Commissioner*, 41 B. T. A. 1266, affirmed, 127 F. 2d 942	10, 11
Oliver, Estate of v. *Commissioner*, 148 F. 2d 210	8
Welch v. *Helvering*, 290 U. S. 111	10

Statutes:

Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302, as amended	2, 8

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 482

ESTATE OF JEROME J. HANAUER, LEWIS L. STRAUSS AND CARRIE H. HANAUER, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 95–106) is unreported. The opinion of the Circuit Court of Appeals (R. 124–129) is reported in 149 F. 2d 857.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 5, 1945. (R. 129.) The petition for a writ of certiorari was filed on October 3, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there is evidence to support the Tax Court's finding that reciprocal trusts created by decedent and his wife were created in consideration of each other so that, for purposes of the estate tax, decedent is to be treated as the grantor of the trust created by his wife.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302 [as amended by Section 404, Revenue Act of 1934, c. 277, 48 Stat. 680].—The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) [As amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 803 (a)].—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference

to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(d) (1) [As amended by Section 401, Revenue Act of 1934, *supra*].—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The decedent, Jerome J. Hanauer, died testate, a resident of New York State, on September 3, 1938, at the age of 63 years. He left surviving him, as the sole members of his immediate family, his widow, Carrie H. Hanauer, age 61, his daugh-

ter, Alice H. Strauss, age 35, his son-in-law, Lewis L. Strauss, age 42, and his grandson, Lewis Hanauer Strauss, age 14. (R. 96.)

On June 3, 1932, and in the State of New York, decedent executed a trust agreement (R. 24–36) whereby he transferred certain securities in trust. The trustees were his wife and his son-in-law, Lewis L. Strauss. The trust provided for the payment of the net income to the decedent's wife during her lifetime and for the distribution of the income and corpus after her death in accordance with provisions which are set forth in detail in the instrument (R. 24–27), but do not appear to be material here. It was also provided that the trust could be amended, altered, revised, or terminated, in whole or in part, upon the consent of decedent's wife and daughter. (R. 96–97.)

The value of the properties so settled in trust by the decedent on June 3, 1932, was, on that date, $751,132.45. Some three years later, on November 8, 1935, he added to the trust securities of the value of $151,648.33. (R. 97.)

On the same day upon which the decedent created his trust, June 3, 1932, his wife created a similar trust which was identical in all respects with the one executed by the decedent, except that her name appeared in all places appropriate, as the grantor, and decedent's name appeared in all places as a beneficiary and trustee, just as the wife's name appeared in the trust agreement

which decedent executed. Thus with respect to the trust created by his wife, the decedent was entitled to the income for life and had the power, in conjunction with the daughter, to amend, alter, revise, or terminate, in whole or in part. The provisions of each trust were "crossed", the trusts being identical except for the substitution of the names of decedent and his wife to make the trusts "cross". (R. 97–98.)

The value of the properties so settled in trust by the decedent's wife was $723,740.96. (R. 98–99.) She did not select the properties which were put in trust under her trust agreement. Decedent and Lewis L. Strauss selected the securities which were put into her trust. (R. 100.)

The net worth of the decedent in 1932 was five million dollars, and in each of the five years preceding the creation of her trust his wife was worth not less than $1,250,000. (R. 99.)

The trust agreements were prepared by Morris L. Ernst, a cousin of Carrie H. Hanauer, who was her and decedent's personal attorney. In the fall of 1931, decedent discussed his idea of creating a trust with Ernst, and Ernst mentioned to Carrie H. Hanauer that her husband was contemplating a trust. Again, in the spring of 1932, decedent discussed the trust with Ernst and, in particular, the clauses of a trust. Ernst also had conversations with Carrie H. Hanauer. Ernst

advised both that if they intended creating trusts they should not delay because gift tax legislation was pending in Congress and probably would be enacted. Ernst submitted drafts of clauses to decedent. As Carrie H. Hanauer was not business wise, Ernst obtained her instructions and told her that he was going to put the same technical clauses in her trust as in decedent's trust. When the trust agreements had been drawn up in Ernst's office, he sent them to decedent, leaving in each agreement a blank page, as a schedule, on which were to be written the descriptions of the properties to be conveyed in trust under each agreement. (R. 99–100.)

In 1931, decedent was a senior partner in the firm of Kuhn, Loeb & Company, and had been a partner since 1912. Among the other partners were Mortimer L. Schiff and decedent's son-in-law, Lewis L. Strauss. (R. 96.) In the autumn of 1931 decedent served notice on his partners that he intended to retire from the partnership. He retired at the end of 1932. He discussed with his wife, his family, and his attorney, problems affecting the management and protection of his personal fortune and that of his wife at or about the time he served his partners with notice of his intended retirement. (R. 100.)

Carrie H. Hanauer had substantial assets of her own. She relied upon the judgment of her hus-

band and son-in-law in making investments. She maintained an account with Kuhn, Loeb & Company, which carried her investments. Also she had a cash account with that firm. She had accounts in other banks. (R. 100.)

In the autumn of 1931 she knew, through Ernst's statements to her, that decedent thought of creating a trust. In 1932 she knew that decedent intended creating a trust in her favor. She asked Ernst if it would be a good idea for her to create a trust too, and Ernst said he thought it would be a good thing for her to do. Carrie H. Hanauer created her trust because her husband, the decedent, created his trust. (R. 100.)

The decedent and his wife did not consider the creation of their respective trusts and did not execute them independently and apart. Each created his respective trust in consideration of the other. (R. 101.)

The Commissioner of Internal Revenue determined that there should be included in decedent's gross estate the value of the property in the trust created by his wife (R. 13, 101), and was sustained by the Tax Court (R. 95–107). The Circuit Court of Appeals affirmed. (R. 124–129.)

ARGUMENT

1. This case presents only a question of fact, with respect to which the Tax Court's finding is conclusive, since it is supported by ample evi-

dence. As has been many times held[1] if the reciprocal trusts created by the decedent and his wife were in fact created in consideration of each other, there is no question that the decedent is to be treated for purposes of the estate tax as the grantor of the trust created by his wife. And, as petitioners concede (Pet. 9–10), if he is so treated Sections 302 (c) and (d) (1), *supra,* require the inclusion of that property in his gross estate.

The Tax Court has made here the explicit finding that each of the trusts was created "in consideration of the other". (R. 101, 106.) That finding was certainly a permissible one upon this record in view of the facts that (a) the trusts were created on the same day; (b) they were drafted by the same attorney; (c) the value of the property placed under each trust was substantially the same ($751,132.45 in the decedent's trust and $723,740.96 in his wife's trust); (d) the trusts were literally and truly "cross trusts" creating identical rights and powers in each spouse, and (e) although decedent had earlier taken up the idea of creating a trust he did not

[1] E. g., *Lehman* v. *Commissioner*, 109 F. 2d 99 (C. C. A. 2d), certiorari denied, 310 U. S. 637; *Cole's Estate* v. *Commissioner*, 140 F. 2d 636 (C. C. A. 8th); *Estate of Oliver* v. *Commissioner*, 148 F. 2d 210 (C. C. A. 3d), affirming *per curiam* the memorandum decision of the Tax Court of April 28, 1944 (1944 P–H T. C. Memorandum Decisions, par. 44,–138); *Estate of Eckhardt* v. *Commissioner*, 5 T. C. No. 80.

do so until his wife's trust was ready for execution. The Circuit Court of Appeals therefore properly affirmed the Tax Court's decision.

The essence of the opinion in the Circuit Court of Appeals is simply that the Tax Court's finding was conclusive, since it was supported by ample substantial evidence. The court stated that it understood the Tax Court's findings to mean (R. 126) "that the estates created by decedent's trust served as a *quid pro quo* for the trust which he caused his wife to make"; that "There was abundant evidence to support those findings, much conceded and much adduced by the petitioners themselves"; and that (R. 127–128) "it was within the power of the trier of fact to make its own conclusion from the basic facts."

It is thus plain that the Circuit Court of Appeals did not reject the Tax Court's view of the case (cf. Pet. 10–12) and has not suggested any novel "psychological test" of "causation" (cf. Pet. 19–21). There can scarcely be any room for doubt upon this point in view of the court's concluding statement that (R. 129) "Since here we have valid findings which bring the case within the scope of the *Lehman* doctrine, the order of the Tax Court was plainly right." The sentence in the opinion to the effect that the court's holding was (R. 128) not to "be taken as an intimation that the evidence here would support a finding that the wife's transfer was effective to bring

about the decedent's transfer,—a finding not essential to support the result reached here," appears in its setting to amount to no more than a statement that there was no necessity to determine then whether or how much [2] of the property placed in trust by the decedent would be includible in the wife's estate when she should die.

2. With respect to the Tax Court's resolution of the factual issue the question is not of course whether the evidence *required* a conclusion that the trusts here involved were created in consideration of each other (cf. Pet. 13, 15, 17–18) or even whether it would support a finding in favor of the party bearing the burden of proof (cf. Pet. 23, fn. 1). For here, the Commissioner's determination being presumptively correct, the burden of proof was upon petitioners (*Welch* v. *Helvering,* 290 U. S. 111), and the sole issue is whether the Tax Court's finding was a *permissible* one. Nor is there any inconsistency between the Tax Court's resolution of the factual issue here and its findings upon different evidence in *McLean* v. *Commissioner,* 41 B. T. A. 1266, affirmed, 127 F. 2d 942 (C. C. A. 5th), and *Lindsay* v. *Commissioner,* 2 T. C. 174. In the *Lindsay* case, for example, it was shown that the husband did not even know that his wife had created a trust (2

[2] It will be recalled that on November 8, 1935, some three years after the two trusts had been created, the decedent had made an additional transfer to the trust which he had created of property worth $151,648.33. (R. 97.)

T. C. 178). In the *McLean* case, involving a gift tax, the Commissioner had determined that the trusts had *not* been created in consideration of each other and the taxpayers had undertaken to show that they were. The Tax Court's holding was simply that upon the evidence there adduced the taxpayers had not carried their burden (41 B. T. A., p. 1267), and the affirmance by the Circuit Court of Appeals was, as here, based upon the ground that the Tax Court's resolution of the factual issue was final.

There is thus no basis for the petitioners' charge (Pet. 22–23) that a different substantive rule of law prevails in gift tax cases from that which prevails in estate tax cases. The decisions merely illustrate that where the evidence is different, different findings of fact may result.

CONCLUSION

The decision below is correct and there is no conflict or any other reason for further review. The petition should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
BERNARD CHERTCOFF,
Special Assistants to the Attorney General.

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October Term, 1945

No. 482

Estate of JEROME J. HANAUER, LEWIS L. STRAUSS and CARRIE H. HANAUER, Executors,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

MORRIS L. ERNST
Solicitor for Petitioners

SAMUEL J. SCHUR
LEO ROSEN
Of Counsel

307 BAR PRESS, INC., 47 WEST ST., NEW YORK. BO. 9—0157 - 8

SUBJECT INDEX

PAGE

POINT I.—The Tax Court and the Circuit Court of Appeals have herein decided a Federal question in a way probably in conflict with an applicable decision of this Court, namely, *Robinette* v. *Helvering*, 318 U. S. 184 (1943) 1

POINT II.—On the basis of respondent's own summary of the applicable law, which correctly states the decisions of the Second Circuit, other Circuit Courts of Appeals and the Tax Court in reciprocal trust cases, the holding of the Circuit Court of Appeals herein is inconsistent with such other decisions and is erroneous 4

POINT III.—The writ prayed for should be granted 5

CASES CITED

Bingham v. Commissioner, 65 Sup. Ct. 1232 (1945) and cases therein cited 3

Robinette v. Helvering, 318 U. S. 184 (1943), affg. 129 Fed. (2d) 832 (C. C. A. 3d., 1942) 1, 2, 3, 4

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POINT I

The Tax Court and the Circuit Court of Appeals have herein decided a federal question in a way probably in conflict with an applicable decision of this Court, namely, *Robinette v. Helvering*, 318 U. S. 184 (1943).

The position taken by respondent in the case at bar as evidenced by its brief in opposition collides not only with the Circuit Court of Appeals decisions discussed in the Petition but also with an applicable decision of this Court, namely *Robinette* v. *Helvering*, 318 U. S. 184 (1943).

The *Robinette* case involved the creation on the same day and at the same place by a mother and daughter of identical cross trusts. They were drawn up by the same attorney, "the family attorney." It was found that they had been executed pursuant to "an agreement" between mother, daughter and stepfather "with a view to keeping the daughter's fortune within the family" (at p. 185).

Thus, virtually every factor relied upon by respondent (and by both lower courts) herein to establish consideration was present in the *Robinette* case plus a finding that "an agreement was made" to create the trusts there involved. Nonetheless, this Court squarely rejected the "contention * * * that an agreement between the parties to execute these trusts was sufficient consideration to support the transfer" (at p. 187). The Court regarded the transaction as being donative in character and refused to accept the creation of one trust as being the consideration for the creation of the other.

The Circuit Court of Appeals for the Third Circuit took the same view of the transfers in the *Robinette* case as did this Court (129 F. (2d) 832, especially at p. 835).

Moreover, the Government itself, respondent herein, argued in its brief in this Court in the *Robinette* case that "the gifts were none the less real because of the concerted action with respect thereto" (Govt. Brief in *Robinette* v. *Helvering, supra,* at pp. 10 and 11). In this case, respondent puts forth a contrary contention. The essence of respondent's argument herein is that

> "This case presents only a question of fact, with respect to which the Tax Court's finding is conclusive, since it is supported by ample evidence. As has been many times held if the reciprocal trusts created by the decedent and his wife are in fact created in consideration of each other, there is no question that the decedent is to be treated for purposes of the estate tax as the grantor of the trust created by his wife" (Resp. Br., p. 8).

We do not quarrel with the contention that "if the reciprocal trusts created by the decedent and his wife were in fact created in consideration of each other" respondent should prevail. However, every factor adverted to by respondent herein as "ample evidence" to prove that the trusts were "created in consideration of each other" was present in the *Robinette* case plus the fact of agreement and still this Court rejected the argument that there "was sufficient consideration to support the transfer" (318 U. S., at 185).

It is clear from the decision of this Court in the *Robinette* case that respondent is in error when it maintains that the question of consideration *vel non* is "only a question of fact." Consideration is a legal concept. The ascertainment of the facts upon which a finding of consideration depends is a question of fact, but whether these factual circumstances taken together add up to what the law calls consideration is a " 'clear cut' question of law." See *Bingham* v. *Commissioner*, 65 Sup. Ct. 1232 (1945) and cases therein cited. It is immaterial that the *Robinette* case involved a gift tax liability while an estate tax is at issue here since the answer to a question of substantive law does not depend upon the statutory context in which it is asked.

This Court held in the *Robinette* case that as a matter of law all the factors relied upon by respondent in the instant case plus the fact of agreement were insufficient to establish consideration; that despite their presence, the transaction must be viewed as donative in character. It would seem to be obvious that the same factors minus the fact of agreement are insufficient as a matter of law to prove consideration in the case at bar. We submit that the contrary decisions of the courts below are "probably in conflict" with the applicable *Robinette* decision of this Court within the meaning of Rule 38 of subdivision 5(b) of the Rules of this Court.

POINT II

On the basis of respondent's own summary of the applicable law, which correctly states the decisions of the Second Circuit, other Circuit Courts of Appeals and the Tax Court in reciprocal trust cases, the holding of the Circuit Court of Appeals herein is inconsistent with such other decisions and is erroneous.

As pointed out *supra,* respondent argues that "if the reciprocal trusts created by the decedent and his wife were in fact created in consideration of each other, * * * the decedent is to be treated for purposes of the estate tax as the grantor of the trust created by his wife" (Resp. Br., p. 8). We do not quarrel with this statement of the law which correctly reflects the decisions (discussed in the Petition) of the Second Circuit as well as of other Circuits and of the Tax Court in reciprocal trust cases. By thus stating the applicable law, respondent acknowledges the necessity for a finding by the Court below that the trusts herein were "created in consideration of each other." But the Circuit Court of Appeals made no such finding. Instead it expressly cautioned against its holding being regarded as such a finding:

> "Nor should it [the holding of the Circuit Court of Appeals] be taken as an intimation that the evidence here could support a finding that the wife's transfer was effective to bring about the decedent's transfer—a finding not essential to support the result reached here" (R. 129-130).

Presumably, it was this failure to find a two-way flow that impelled the Court below to resort to its novel theory of "causation" to support the result reached by the Tax Court. We have pointed out in the Petition that in every other reciprocal trust case where the trust created by

one settlor was taxed to the estate of the other, there was a finding of mutual consideration, *i. e.*, that the trusts had been created in consideration of each other. The announced refusal of the Court below to make such a finding herein renders its decision inconsistent with all the others in the field and erroneous under the rule of law invoked by respondent itself.

POINT III

The writ prayed for should be granted.

Respectfully submitted,

MORRIS L. ERNST
Solicitor for Petitioners

SAMUEL J. SCHUR
LEO ROSEN
Of Counsel